



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

January 16, 1998

Mr. James T. Rain
Locke Purnell Rain Harrell, P.C.
2200 Ross Avenue, Suite 2200
Dallas, Texas 75201-6776

OR98-0169

Dear Mr. Rain:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 111740.

The North Texas Tollway Authority (the "authority"), which you represent, received three open records requests for the proposals submitted to the authority in connection with an RFP for the design, fabrication, assembly, and delivery of automatic coin machines for use in the collection of tolls on the Dallas North Tollway System. Two of those requests additionally seek copies of "all analyses, evaluations, correspondence, memoranda, and other documents" pertaining to the RFP. You do not contend that any of the requested information is excepted from required public disclosure, but rather you have asked this office to determine, pursuant to section 552.305 of the Government Code, whether the requested information must be released to the requestors.

Consequently, in accordance with the practice this office established in Open Records Decision No. 575 (1990), we notified representatives of the three companies that submitted proposals to the authority in response to the RFP that we received your request for an open records decision regarding their proposals and related documents. In our notification, this office requested an explanation as to why any of the information at issue was excepted from public disclosure, with the caveat that unless we received such explanation within a reasonable time, this office would instruct the authority to disclose the information. One of the companies we notified, TransCore, has subsequently informed you that it has no objection to the release of its proposal. Accordingly, we conclude that the authority must release TransCore's proposal.

Representatives of the two remaining companies that submitted proposals to the authority, TDC, Inc. ("TDC") and the Ascom Trindel Corporation ("Ascom"), each contend that their respective proposals are excepted from required public disclosure pursuant to section 552.110 of the Government Code. Section 552.110 of the Government Code excepts from required public disclosure "[a] trade secret or commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision." TDC contends that its proposal constitutes "trade secrets" and thus is excepted from public disclosure under section 552.110. Ascom contends that portions of its proposal and of its correspondence with the authority constitute both "trade secrets" and confidential "commercial or financial information" under section 552.110.¹

A "trade secret"

may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business in that it is not simply information as to single or ephemeral events in the conduct of the business, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees. . . . A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939) (emphasis added). *See also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

¹We note, however, that none of the three companies notified by this office contend that any of the remaining information contained in the additionally requested records, *i.e.*, the "analyses, evaluations, correspondence, memoranda, and other documents" pertaining to the RFP, are excepted from public disclosure. The authority therefore must release these additional materials in their entirety, except as discussed, *infra*.

There are six factors to be assessed in determining whether information qualifies as a trade secret.² This office must accept a claim that information is excepted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5. However, where no evidence of the factors necessary to establish a trade secret claim is made, we cannot conclude that section 552.110 applies. Open Records Decision No. 402 (1983).

In this instance, TDC has not demonstrated how the six factors for determining whether information constitutes trade secrets apply to its proposal, but rather has made only general arguments as to why its proposal should be withheld from the public. We therefore conclude that TDC has not met its burden of establishing that any portion of its proposal is excepted from public disclosure under section 552.110. The authority therefore must release TDC's proposal in its entirety.

On the other hand, Ascom has specifically argued that the six factors apply to its proposal, and this office generally agrees that those portions of the proposal that Ascom seeks to withhold may be withheld from the public as trade secrets, with the following exceptions. First, this office has previously determined that resumes listing the experience of employees of bidders do not come within the section 552.110 exception. Open Records Decision No. 175 (1977). Consequently, this type of information found in Tab 4, section 4.0 must be released from Ascom's proposal.

Second, although Ascom characterizes certain financial statements in Tab 3, section E it submitted to the authority as "trade secrets," those financial statements may not be withheld as such because this type of information does not comport with the definition of a trade secret in the Restatement of Torts. Because Ascom has made no other argument regarding the withholding of the financial statements, these documents must be released.

²These six factors are

- 1) the extent to which the information is known outside of [the company's] business;
- 2) the extent to which it is known by employees and others involved in [the company's] business;
- 3) the extent of measures taken by [the company] to guard the secrecy of the information;
- 4) the value of the information to [the company] and to [its] competitors;
- 5) the amount of effort or money expended by [the company] in developing this information; and
- 6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Finally, although Ascom contends that the details of its pricing proposal constitute trade secrets, this office long ago established that while technical material which relates to the substance of a proposal is generally excepted from disclosure as trade secret information, pricing proposals are not so excepted and may be withheld only during the bid submission process. *See* Open Records Decision No. 306 (1982). *See also* RESTATEMENT OF TORTS § 757 cmt. b (1939) ("information as to single or ephemeral events in the conduct of the business, as for example the amount or other terms of a secret bid for a contract" is not trade secret information).

The authority must withhold, however, the following portions of Ascom's proposal:

Tab 2: Sections II, III, V

Tab 3: Section D

Tab 4: Sections 3.1, 3.1.1, 3.1.2, 3.1.4, 3.1.5, 3.2

Tab 5: Information as marked

Tab 6: All

None of the remaining information contained in Ascom's proposal may be withheld as "trade secret" information. We have marked, however, the portions of the correspondence between the authority and Ascom that also come within the protection of section 552.110 as "trade secret" information, but the remaining portions of the correspondence must be released.

Finally, Ascom contends that the pricing information contained in its proposal is protected from disclosure by the second prong of section 552.110 as "commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision." Section 552.110 is patterned after section 552(b)(4) of the federal Freedom of Information Act, 5 U.S.C. § 552 *et. seq.* Open Records Decision Nos. 309 (1982), 107 (1975). The test for determining whether commercial or financial information is confidential within the meaning of section 552(b)(4) is as follows:

a commercial or financial matter is 'confidential' for purposes of the exemption if disclosure of the information is likely to have *either* of the following effects: 1) to impair the Government's ability to obtain necessary information in the future; *or* 2) to cause substantial harm to the competitive position of the person from whom the information was obtained. (Emphasis added.)

National Parks and Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974). A factor to be considered in these tests is whether the information is of a type that is customarily released to the public. See, e.g., *AT&T Info. Sys., Inc. v. General Servs. Admin.*, 627 F. Supp. 1396, 1403 (D.D.C. 1986), *rev'd on other grounds*, 810 F.2d 1233 (D.C. Cir. 1987).

The governmental body that maintains requested information is in the best position to determine whether disclosure will impair its ability to obtain similar information in the future. You have expressed no opinion on this subject. If the second test is satisfied, the information may be withheld. The courts have held that

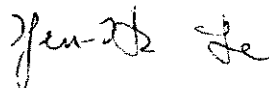
in order to show the likelihood of substantial competitive harm, it is not necessary to show actual competitive harm. *Actual competition and the likelihood of substantial competitive injury* is [sic] all that need be shown. (Emphasis added.)

Gulf & W. Indus. v. United States, 615 F.2d 527, 530 (D.C. Cir. 1979); see also *National Parks and Conservation Ass'n v. Kleppe*, 547 F.2d 673, 679 (D.C. Cir. 1976). "Conclusory and generalized allegations" of competitive harm have been held insufficient to satisfy the requirements for non-disclosure. See *Kleppe*, 547 F.2d at 680. We note that because the cost specifications contained in the proposal are always subject to change in any future contracts, Ascom's contention that a competitor would obtain unfair advantage on future contracts is too speculative for consideration. Section 552.110 requires more than general allegations of unspecified competitive injury. Open Records Decision No. 494 (1988). Additionally, this office has previously determined that while technical material which relates to the substance of a proposal may generally be excepted from disclosure under section 552.110, pricing proposals are not so excepted and may be withheld only during the bid submission process. See Open Records Decision No. 306 (1982). See also Gov't Code § 552.022(3) ("information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body" generally considered to be public information). The authority therefore must release all of the pricing proposals submitted by Ascom, as well as all remaining portions of Ascom's proposal not listed above as trade secret information.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue

under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/RWP/rho

Ref.: ID# 111740

Enclosures: Marked documents

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